(1)

Supreme Court, U.S.
FILED
OCT 3 1988
JOSEPH E. SPANIOL, JR.
CLERK

88-823

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

DR. ROBERT E. PITTS, PRO SE PETITIONER

V.

TURNER AND BOISSEAU, CHARTERED, LEE TURNER, ELDON L. BOISSEAU, HAL D. MELTZER, JOHN L. CARMICHAEL, DEBORAH L. CARNEY, CASEY LAW, CYNTHIA G. BARRETT, INTERSTATE NATIONAL INSURANCE, MAGINNIS AND ASSOCIATES, ROBERT T. STEPHAN, HAROLD S. YOUNGENTOB, H. PHILLIP ELWOOD, ARTHUR E. PALMER, EDWIN D. SMITH, AND JUSTICE B. KING,

Respondents,

Pro Se Petition For Writ of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert E. Pitts D.D.S. PRO SE
554 South Oliver
Wichita, Kansas 67218
(316) 685-5591

October 24, 1988

43 pp

QUESTIONS PRESENTED

I.

WAS THE WHOLE CASE TAINTED THROUGH AND THROUGH BY THE KANSAS ATTORNEY GENERAL, ROBERT T. STEPHAN?, AND WERE THERE SERIOUS CONFLICTS OF INTEREST, AND CIVIL RIGHTS VIOLATIONS?

II.

SHOULD THE COURTS HAVE RECEIVED BRIEFS AND FILINGS FROM THE ATTORNEY GENERAL'S OFFICE?

III.

DID THE LOWER COURTS ERR IN ANY WAY AT ALL?

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TABLE OF AUTHORITIES

1.) U.S. Constitution

2.) 28 U.S.C. § 1254 (1)

3.) 28 U.S.C. § 2101 (C)

4.) 18 U.S.C. Sections 1961-1965 (Civil RICO)

5.) 42 U.S.C. Sections 1983 and 1985 (2)

6.) 28 U.S.C. Sections 1331 and 1343

7.) Pendent common law claims: Legal malpractice; Breach of Fiduciary Duty; Breach of Contract; Tortious interference.

8.) Leon G. Smith v. D. Keith Whatcott, No. 84-1337, U.S. Court of Appeals Tenth (10th) Circuit March 25, 1985, page 1098, 757 Federal Reporter, 2d series.

9.) American Bar Association Model Rules of Professional Conduct.

STATEMENT OF CASE

This is a federal civil rights and fraud case filed pursuant to 18 U.S.C. Sections 1961-1965 (Civil RICO) and 42 U.S.C. Sections 1983 and 1985 (2), with jurisdiction arising out of 28 U.S.C. Sections 1331 and 1343. Pendent common law claims were also alleged, as follows: Legal malpractice; breach of fiduciary duty; breach of contract; tortious interference with contractual rights; and, tortious interference with prospective business advantage.

Appellant is a 43-year-old white American male, with a doctorate in dentistry from the University of Missouri at Kansas City School of Dentistry, who resides in Wichita, Kansas. (Doc. No. 1, Complaint, filed October 15, 1884, p.2). Shortly prior to June, 1984, appellant's license to practice dentistry in Kansas was wrongfully and unlawfully

taken, and appellant was involved in extensive litigation on that issue generally from 1982 until May of 1984, appellees Turner & Boisseau, Chartered, Lee Turner, Eldon L. Boisseau, Hal D. Melzer, John L. Carmichael, Deborah L. Carney and Casey Law represented appellant in such litigation relating to efforts to take appellant's dental license. On June 12, 1984, appellant filed a civil rights lawsuit in the United States District Court for the District of Kansas (Case No. 84-4207) making a Constitutional challenge to his said dental license deprivation. That lawsuit is still pending in the tenth circuit. That lawsuit was filed against the Kansas Board of Dental Examiners(a/k/a/ The Kansas Dental Board), Robert L. Stephans, Roger p. Rupp, Aubrey A. Gentry, Norman G. Giebler, John F. Riggs, Jr., James E. Pollem, Cynthia G. Barrett, Wesley F. Park, Harold S. Youngentob and H. Phillip Elwood.

Appellee Cynthia G. Barrett, a member of and secretary to the Kansas Dental Board, a key defendant in Case No. 84-8407, employed Turner & Boisseau, Chartered to represent her in that lawsuit, and Turner & Boisseau, Chartered filed responsive pleadings on Barrett's behalf in case No. 84-4207, including a detailed answer.

Thereafter, and on October 15, 1984, appellant filed Complaint herein. Eventually, after substantial discovery and order of the court below, appellant filed "First Amended Complaint" on July 25, 1986. (Doc. No. 223, "Memorandum and Order", filed July 22, 1986; Doc. No. 224, "First Amended Complaint", filed July 25, 1986). Additional allegations of appellant contained in such Complaint/Amended Complaint included:

a) Kansas Dental Board is a creature of state government, enpowered

to license and punish dentists. (Parenthetically, the Kansas Dental board was dismissed from this action by stipulation filed January 27, 1986-- Doc. No. 207, "Stipulation of Dismissal of Defendant Kansas Dental Board"' filed January 27, 1986).

b) Appellees Interstate National Insurance and Maginnis and Associates are carrier and agent respectively of Barrett, each engaged by and premiums paid by Kansas Dental Board on behalf of Barrett.

c) Appellee Stephan is Attorney General for the State of Kansas, is counsel for the Kansas Dental Board and co-counsel with Turner and Boisseau Chartered for Barrett in Case No. 84-4207, at the behest of and paid by Interstate National Insurance and Maginnis and Associates. Further, appellee Stephen was formerly co-counsel with Turner &

Boisseau, Chartered for appellant in appellant's fight with the Kansas Dental Board, yet later was co-counsel with Turner & Boisseau, Chartered for Barrett against appellant in Case No. 84-4207 in the very same matters wherein Stephan was for appellant earlier, and at all times has been and still is counsel for Barrett and Kansas Dental Board and other defendants in Case No. 84-4207 and this case against appellant in the same matters generally wherein he (Stephen) formerly advised and counseled appellant as a fiduciary and legal advisor to appellant.

d) Appellees Youngentob, Elwood and Palmer are law partners with offices in Topeka, Kansas, employed by the Kansas Dental Board in various capacities, including investigating dentists in Kansas. Youngentob and Elwood in that case. Appellees Smith and King are also law partners in Topeka, Kansas, and they were em-

ployed to represent Youngentob and Elwood in Case No. 84-4207.

e) Interstate National Insurance and Maginnis and Associates employed Turner and Boisseau, Chartered as co-counsel with Stephan for Barrett in Case No 84-4207, by Kansas Dental Board and in collusion with other appellees herein, with full knowledge that Turner and Boisseau, Chartered's enmity against appellant and his counsel on religious grounds, Turner and Boisseau, Chartered having given said appellees considerable evidence of his complete familiarity with both appellant and appellant's counsel, as, for example, in a letter from Lee Turner to Interstate National Insurance dated August 30, 1984, wherein Mr. Turner stated: "In viewing the allegations of the Petition (sic), it is obvious that this is a typical Fred Phelps type lawsuit. Indeed there is a certain kindred of spirit between

Phelps and his client in that both of them profess to be itinerant preachers and in Phelps' case, as I understand it, he gives a great deal of legal income to his own church which, as I understand further, is located in his home. Fred Phelps' civil rights lawsuits are very extensive procedures and usually culminate in an actual trial."

f) When appellant was represented by Turner and Boisseau, Chartered from approximately May, 1982 in his dispute with the defendants in Case No. 84-4207 concerning his dental license, appellant made full revelation and disclosure of all his secrets and confidences together with delivery of all his relevant vital records to Turner and Boisseau, Chartered in connection therewith. All other appellees herein at all relevant times, bound together in an unlawful conspiracy to interfere with appellant's civil rights by

obstructing the due course of justice in Case No. 84-4207, had full knowledge of that fiduciary relationship existing between appellant and Turner and Boisseau, Chartered. In order to gain an unlawful advantage in Case No. 84-4207, in order to further punish appellant for his said religion, and in order to unlawfully deter, punish, hinder, and obstruct appellant in prosecuting Case No. 84-4207, all other appellees herein conspired with Turner and Boisseau, Chartered and others to engage and employ Turner and Boisseau, Chartered to enter and remain in Case No. 84-4207 against appellant, ostensibly as co-counsel with Stephan and others for the defendant Barrett. Turner and Boisseau, Chartered have thus been conspiratorially induced by the other appellees herein to betray the confidences and secrets of appellant, and to work against appellant (their former client) in breach of trust and violation of said

fiduciary relationship in Case No. 84-4207.

g) Additional allegations were made by appellant in the Complaint/Amended Complaint, including substantial allegations of fraud and Civil RICO violations. For a better part of a year after this lawsuit was filed, in addition to normal pretrial discovery and other pretrial procedures, the lower court was barraged with numerous motions seeking dismissal of this lawsuit, to which motions appellant responded. Notwithstanding the filing of such dispositive-type motions, the case proceeded with extensive pretrial discovery, pretrial scheduling hearings, pretrial arguments of discovery and other pretrial procedural motions, pretrial listings of witnesses and exhibits, and so on. There were 242 docket entry filings(requiring 7 court clerk files) over the course of almost two (2) years during pretrial lit-

igations, which gives some idea of the voluminous amount of pretrial work that had been done on this case. A final pretrial conference had been scheduled for November 20, 1986 at 1:30 p.m.

As previously noted, appellant filed his First Amended Complaint on July 25, 1986. (Doc. NO. 224, "First Amended Complaint", filed July 25, 1986). No motions to dismiss were thereafter filed. However, on August 26, 1986, by "Memorandum and Order", the lower court dismissed this action on the face of the Complaint/ Amended Complaint, granting all of appellees' motions to dismiss which had been filed early on in this case's history. Judgement was then entered on August 28, 1986. (Doc. No. 240, "Memorandum and Order", filed August 26, 1986; Doc. No. 241 "Judgement on Decision by the Court Entered by the Clerk", filed August 28, 1986). Notice of appeal was filed by appellant

on September 25, 1986, (Doc. No. 242, "Notice of Appeal", filed September 25, 1986). The Lower Court's decision was then affirmed by the Tenth (10th) Circuit, on July, 5, 1988.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988
NO._____

Dr. Robert E. Pitts, PRO SE Petitioner

V.

Turner and Boisseau, Chartered, Et Al.
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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The petitioner, Robert E. Pitts, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court Of Appeals for the Tenth Circuit entered on July 5, 1988.

OPINION BELOW

The Court of Appeals entered its decision affirming the decision of the Federal District Court on July 5, 1988. A copy of the decision is attached as appendix A.

JURISDICTION

The judgement of the United States Court of Appeals for the 10th Circuit was entered on July 5, 1988. This petition was filed within 90 days of that judgement. This court has jurisdiction pursuant to 28 U.S.C. § 1254 (1), and §2101 (C).

Questions Presented For Review

I.

Does the Tainting of the case through and through by the Kansas Attorney General's office (see enclosure appendix B), and the alledged obvious serious conflict of interest by the Attorney General himself of the State of Kansas and his office staff of attorney's, and the ethical violations of the various attorney's involved, of the code of conduct, and the U.S. constitution, and Due Process, and civil rights violations, demands and cries out that this case

(especially because of Smith v. Whatcott)be remanded back to Federal Court for a swift and immediate jury trial, and to a new judge? Yes, we believe it does!, and we ask respectively that whatever other actions or relief the court deems necessary and appropiate be applied.

II.

The petitioner pro se, also asks whether the filings and briefs etc. of the Kansas Attorney General's office should have been entered or received or reviewed, or even considered? (Please use Appendix B), David Plinsky is an attorney in the Attorney General's office!, (see Appendix C).

III.

Please review the full court record in District Court and the Court of Appeals, and look for any and all errors by any Court.

CONCLUSION

The petitioner (pro se) respectfully

asks that an out of State Federal Investigation be commensed immediately! Please apply the correct law, correctly decide the facts and consider all grounds for relief.

The petitioner (pro se) sincerely believes that these are reasons enough to grant the Writ. Thank You.

Dated: October 24, 1988

Respectfully submitted

Robert E Pitts DDS

Robert E. Pitts D.D.S. (PRO SE)
554 South Oliver
Wichita, Kansas 67218
(316) 685-5591

Appendix (A)

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

86-2442

DR. ROBERT E. PITTS, Plaintiff-Appellant,	
V.	
TURNER AND BOISSEAU, CHARTERED, LEE TURNER, ELDON L. BOISSEAU, HAL D. MELTZER, JOHN L. CARMICHAEL, DEBORAH L. CARNEY, CASEY LAW, CYNTHIA G. BARRETT, INTERSTATE NATIONAL INSURANCE, MAGINNIS AND ASSOCIATES, ROBERT T. STEPHAN, HAROLD S. YOUNGENTOB, H. PHILLIP ELWOOD, ARTHUR E. PALMER EDWIN D. SMITH, and JUSTICE B. KING, Defendants-Appellees	On Appeal From The United States District Court For The District Court For The District of Kansas (D.C. No.84-4342-S)

Opinion Date; Filed July,5, 1988

Submitted on the briefs:

Fred W. Phelps, Jr. and John R. Balhuizen of Phelps--Chartered, Topeka, Kansas, for Plaintiff-Appellant.

Jeffery Jones of Sloan, Listrom, Eisenbarth, Sloan & Glassman,Topeka, Kansas, for De-

fendants-Appellees Turner and Boisseau, Chartered, Lee Turner, Eldon L. Boisseau, Hal D. Meltzer, John L. Carmichael, Deborah L. Carney and Casey Law.

William Scott Hesse, Assistant Attorney General, Topeka, Kansas, for Defendants-Appellees Cynthia G. Barrett and Robert T. Stephan.

Robert J. Perry of Marshall, Hawks, Hendrix, Schenk & Nichols, Topeka, Kansas, for Defendants-Appellees Interstate National Insurance and Maginnis and Associates.

Alan P. Blinzler of Blackwell, Sanders, Matheny, Weary & Lombardi, Overland Park, Kansas, and Williams H. Sanders, Sr. of Blackwell, Sanders, Matheny, Weary & Lombarde, Kansas City, Missouri, for Defendants-Appellees Harold S. Youngentob, H. Phillip Elwood, Arthur E. Palmer, Edwin D. Smith and Justice B. King.

Jerry R. Palmer, Topeka, Kansas, for Defendant-Appellee Cynthia G. Barrett.

Martha Coffman-Gallagher, Lawrence, Kansas, for Defendant-Appellee Casey Law.

Before ANDERSON, SETH and BRORBY, Circuit Judges.

SETH, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34 (a); Tenth Cir. R. 34.1.8. The cause is therefore ordered submitted without oral argument.

This is an appeal of the district court's dismissal of appellant's claims under 42 U.S.C. S 1961. et seq., the Racketeer Influenced and Corrupt Organizations Act, and pendent state claims of breach of fiduciary duty, breach of contract, tortious interference with prospective business advantage and negligence.

The facts relevant to this appeal are as follows. Appellant prior to this suit was involved in a proceeding with the KansasDental Board reguarding his license to practice dentistry in Kansas. Appellant in that action was represented

by Turner and Boisseau, Chartered. After his license was revoked appellant filed a civil rights suit, No. 84-4207, against the Kansas Dental Board, its members and its investigators. Turner, who had represented appellant in the revocation proceedings, this time assisted State Attorney General Stephan in representing the Secretary of the Dental Board. Appellant filed this action October 15, 1984 against the law firm of Turner and Boisseau and the members of the firm individually: Lee Turner, Eldon L. Boisseau, Hal D. Meltzer, John L. Carmichael, Deborah L. Carney, and Casey Law; the Kansas Dental Board; Interstate National Insurance and Maginnis and Associates, carrier and agent of the Board; Robert T, Stephan, State Attorney General who was co-counsel in No. 84-4207;Harold S. Youngentob and H. Phillip Elwood, Board investigators;

and Arthur E. Palmer, Edwin D. Smith and Justice B. King, attorneys for the investigators in No. 84-4207. In this action appellant contends the defendants who were aware of the fiduciary relationship between appellant and Turner, conspired with Turner and others to get him to come to work for them and share information he learned in the revocation proceedings. As a result of this, appellant alleges his civil rights have been violated pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1985 (2) and their actions violated RICO. Each defendant filed a motion to dismiss. Appellant filed an amended complaint July 25, 1986. On August 26, 1986 the district court entered its order dismissing appellant's amended complaint and his pendent state law claims. This appeal followed.

In Shaw v. Valdez, 819 F.2d 965, 968 (10th Cir.), we stated what the standard of review is for dismissals pursuant to

Fed. R. Civ. P.12(b) (6):

> "In reviewing a dismissal for for failure to state a claim, we must accept as true the plaintiff's well-pleaded factual allegations and all reasonable inferences must be indulged in favor of the plaintiff. Dismissal is appropriate only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" (Citations omitted)

Appellant contends the trial court erred in dismissing his claim under 18U.S.C. § 1961, et seq. or the Racketeer Influenced and Corrupt Organizations Act. In Torwest DBC, Inc. v. Dick, 810 F.2d 925, 927-929 (10th Cir.), we discussed what a plaintiff must plead in order to establish a RICO violation:

> "A violation of section 1962 (c) thus 'requires (1) conduct (2) of and enterprise (3) through a pattern (4) of racketeering activity.' Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S. Ct. 3275, 3285, 87 L. Ed. 2d 346 (1985). RICO defines racketeering activity as, inter alia, any act that is indictable under 18 U.S.C. § 1341 (mail fraud) or18 U.S.C. § 1343 (wire fraud).

> See 18 U.S.C. § 1961 (1) (B). RICO also states that a '"pattern of racketeering activity" requires at least two acts of racketeering activity.' 18 U.S. U.S.C. § 1961 (5).
>
> . . . .
>
> ". . . [T]o establish a RICO pattern, a plaintiff must also demonstrate continuity, that is, 'the threat of continuing activity.' Sedima, 105 S. Ct. at 3285 n. 14. This element is derived from RICO'S legislative history, which indicates that RICO does not apply to 'sporadic activity' or to the 'isolated offender'. Id.
>
> "The continuity requirement has been the source of considerable difficulty. Courts generally agree that to make an adequate showing of continuity under Sedima, a plaintiff must demonstrate some facts from which at least a threat of ongoing illegal conduct may be inferred. A scheme to achieve a single discrete objective does not in and of itself create a threat of ongoing activity, even when that goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished."

The trial court in the instant case found

> "that there are no specific allegations to establish that

> more than one scheme to defraud the plaintiff was involved. To the contrary, the court finds that the basis of plaintiff's RICO claim is based on action which revolves upon the Kansas Dental Board's revocation of plaintiff's dental license. In the present action, plaintiff alleges that defendants Stephan and Turner and other defendants schemed to defraud plaintiff of his confidences and secrets by representing that such confidences and secrets would not be revealed to others or be used against him. The court finds that plaintiff's complaint only states one scheme, even though it alleges a general statement that many acts transpired to carry out this scheme."

After examining appellant's amended complaint and making all resonable inferences in favor of appellant we agree that there is only one scheme alleged and this alone does not establish a RICO "pattern" which is required to support a RICO claim.

In addition to dismissing the RICO claim, the trial court dismissed appellant's 42U.S.C. § 1985 (2) claim. 42U.S.C. § 1985

(2) provides:

> "If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror. . . "

After reviewing appellant's complaint we agree withthe trial court's finding that appellant did not state a claim under § 1985 (2). Appellant's complaint fails to allege how appellees conspired to keep him from testifying in court; or how they injured his person or property on account of his having attended or testified in court or how they influenced the verdict,

presentment of indictment of any grand or petit juror.

Appellant also maintains the trial court erred in dismissing his 42 U.S.C. § 1983 claim. To state a claim for relief under section 1983 a plaintiff must show that he has been deprived of any rights, privileges, or immunities secured by the Constitution and laws and that the defendant acted under color of state law. In Brown v. Chaffee, 612 F.2d 497, 501 (10th Cir.) (quoting Monroe v. Pape, 365 U.S. 167, 184), we held that:

> "Acting under color of state law as required by section 1983 is defined as the '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"

After viewing the pleadings in the light most favorable to appellant, we are unable to ascertain how any of the appellees acted under color of state law. We, there-

fore, affirm the trial court's dismissal of appellant's section 1983 claim.

Finally, appellant maintains the lower court erred in dismissing his pendent state law claims of breach of fiduciary, duty, breach of contract, tortious interference with contractual rights and prospective business advantage, and negligence. There is no basis for diversity jurisdiction in the instant case nor are there any remaining federal causes of action. In the absence of either federal question or diversity jurisdiction we do not find the trial court abused its discretion in dismissing the pendent state claims.

AFFIRMED.

Appendix (B)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ROBERT E. PITTS, Plaintiff/Appellant,	)	
V.	)	No. 87-2401
KANSAS BOARD OF DENTAL EXAMINERS; ROGER P. RUPP; AUBREY A. GENTRY; NORMAN G. GIEBLER; JOHN F. RIGGS JR.; ROBERT L. STEPHENS; JAMES E. POLLOM; CYNTHIA G. BARRETT; F. WESLEY PARK; HAROLD S. YOUNGEN- TOB and H. PHILLIP ELWOOD) Defendants/appellees)	)	Lower Docket No. 84-4207

Motion To Amend

Comes now, Robert E. Pitts, plaintiff/appellant, and I respectfully move that the Court, on the above captioned matter, allow me to amend my motion to remove the Kansas Attorney General's office and all of its attorneys with new additional information and to answer the response of the Kansas Attorney General's office.

This case does indeed have its own set of peculiar facts. I refer the Court to my deposition and exhibits thereof in case #84-4207, and also in case #84-4342, both

Lower Docket numbers (#). I believe both cases are tainted through and through by alleged serious Ethical Violations by the Attorney General himself and the attorneys in the Attorney General's office for the great State of Kansas. Many of the facts to support the motion are contained in my depositions, especially the deposition in case #84-4342, Tenth Circuit case #84-2442.

The nature of the Conflict of Interest is that Attorney General Robert T. Stephan, as acting Attorney and as an attorney representative, per the Preamble of the American Bar Association; A Lawyer's Responsibilities, Robert T. Stephan acted as my attorney, as an advisor and evaluator pertaining to my legal problems with the Kansas State Dental Board, starting in the spring of 1982 (please see enclosed new evidence). My cases have been "tainted" because of Rule 1.7-B whereby the Attorney

General was a past "friend" of me personally, and thereby should not be representing even the Dental Board et al because of his own personal interest, thereby his loyalty is impaired. Under Rule 1.7[15],I believe we can call in question the fair or efficient administration of justice in both of my Cases. I had numerous telephone conversations with Attorney General Stephan, and the telephone company records will reflect that and be my evidence. I also mailed voluminous personal confidences and secrets to the Attorney General at his Attorney General's office where all the Attorney General's attorneys work, and they still have access to that information (please see Rule 1.8).

Under Rule 1.9 (A) and (B), the Attorney General's professional conduct is again called into question. I was a previous client of the Attorney General, and, under Rule 1.9; Comment and Model Code Comparison, the Attorney

General did not avoid even the appearance of impropriety.

As for the other attorneys in the Attorney General's office, I believe that Rule 1.10(A) is the one of the rules that apply. There could be other rules that apply also, but this is up to the expertise of the Court, since I am not an attorney.

Whereas, both of my Court cases are separate, they are also interconnected. The Attorney General, Robert T. Stephan, and Attorney David Plinsky in the Attorney General's office, the secretary for the Attorney General, and the Attorney General's ex-wife will all be called as witnesses in both Court cases. David Plinsky and the Attorney General both do have personal knowledge pertaining to my allegations of religious discrimination, and they will both be called to District Court to a new judge.

I do argue strongly that I was a

former client of Attorney General Stephan, and he was also a former judge on a real estate case of mine in District Court also. I am entitled to have all of my confidences and secrets preserved which the Attorney General Stephan and his subordinate attorneys are privy to and have been privy to for several years now. I believe ethical violations have occurred and are now occurring. I also believe that all attorneys involved in both cases were aware that ethical violations occurred and did not report them!

I believe my cases have been seriously tainted and should be hopefully and respectfully remanded to a new judge in District Court. I respectfully ask the Court to investigate this whole matter expeditiously by an out-of-state investigative authority.

Respectfully submitted,

Robert E. Pitts
804 South Oliver
Wichita, Kansas 67218

By Robert E Pitts DDS

Robert E. Pitts, D.D.S.,
Pro Se

CERTIFICATE OF SERVICE

This is to certify that a copy of this Motion to Amend was served by depositing same in the U.S. mail, 1st class postage prepaid, this _____day of _____, 1988, to opposing counsel of record.

_____

Robert E. Pitts D.D.S.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DR. ROBERT E. PITTS, Plaintiff, -VS- TURNER AND BOISSEAU, CHARTERED, et al., Defendants.	Case No. 84-4342

PLAINTIFF'S WITNESS AND EXHIBIT LIST

Comes now plaintiff and incorporates by reference his list of witnesses and exhibits filed previously herein on August 21, 1985, and supplements it as follows:

WITNESSES

1. Betty Stephen, Wichita, Kansas.
2. Defendants Stephan's personal secretary during the years 1982 to 1984.
3. Vern Miller, 1202 North Emporia Wichita, Kansas 67214.
4. Judy Stromberg, Kansas City, Missouri.

5. David Plinsky, 1028 Western, Topeka, Kansas.

6. R. Lansdowne, D.D.S., 2516 E. Central, Wichita, Kansas.

7. Richard Peppard, D.D.S. 8927 W. Central, Wichita, Kansas.

8. Ron Riley, D.D.S.,1431 S. Bluffview Drive, Wichita, Kansas.

9. Beau Williams, 1601 N.W. Expressway, Oklahoma City, Oklahoma.

10. Connie Scott, Topeka, Kansas.

11. Ed Hall D.D.S., 3311 E. Murdock, Wichita, Kansas.

12. W. Terrence Kilroy, Commerce Bank Bldg., Kansas City, Missouri.

13. C.A. Raben, D.D.S., St. Francis Medical Bldg., Suite 410.

14. Jack Kilroy, Kansas City, Missouri.

15. Ed Nazar, 331 E. Douglas, Wichita, Kansas.

16. Dr. Louis Morgan, 8030 E. E. Kellogg, Wichita, Kansas.

17. All persons listed in plaintiff's witness and exhibit lists filed in Pitts v. Kansas Board of Dental Examiners, et al., Case No. 84-4207-R.

Exhibits

1. All exhibits listed in plaintiff's witness and exhibit lists filed in Pitts v. Kansas Board of Dental Examiners, et al., Case No. 84-4207-R.

Plaintiff reserves the right to amend the foregoing by making such additions or deletions as the facts and law of the case

so dicate.

PHELPS-CHARTERED
1414 South Topeka Boulevard
Post Office Box 1886
Topeka, Kansas 66601
(913) 233-4162

By:

BETTY JOAN PHELPHS
Attorney for Plaintiff.

Certificate of Service:

I hereby certify that copy of the foregoing "Plaintiff's Witness and Exhibit List" was regularly mailed this 1st day of August, 1986, to:

Thomas L. Theis, 714 Capitol Federal Building, Topeka, Kansas 66603;

Bruce E. Miller, Office of the Attorney General, Kansas Judicial Center, 2nd Floor, Topeka, Kansas 66612;

Robert J. Perry, 210 Commerce Bank Building, 31st and Topeka Boulevard, Topeka, Kansas 66611;

Michaela Nicolarsen, 40 Corporate Woods-Suite 210, 1401 Indian Creek Parkway, Overland Park, Kansas 66225-5446;

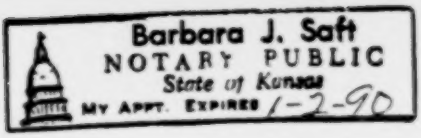
William H. Sanders, Five Crown Center-Suite 600, 2480 Pershing Road, Kansas City, Missouri 64108;

Martha Coffman-Gallagher, 7 West Eleventh, P.O. Box 1392, Larwence, Kansas 66044-5892; and

Jerry R. Palmer, Columbian Building-Suite 102, 112 West 6th Street, Topeka, Kansas 66603.

PHELPS-CHARTERED

By:
BETTY JOAN PHELPHS
Attorneys for Plaintiff.



Subscribed and sworn to before me this

25TH day of October, 1988.

Barbara J. Saft

Notary Public in and for Sedgwick County, Kansas.

I, Robert E. Pitts D.D.S., (appellant/ petitioner) hereby certify that on (PRO SE)

October 27, 1988,

I mailed a copy of the foregoing Writ Of Certiorari by United States Mail, postage prepaid, to Attorney's of Record

(defendant/respondent or attorney therefor) at Their last known address.

Dated October 27, , 19 88.

Robert E Pitts DDS

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Supreme Court, U.S.
FILED
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No. 88-823 (2)

In The

Supreme Court of the United States

October Term, 1988

DR. ROBERT E. PITTS,

Petitioner,

v.

TURNER AND BOISSEAU, CHARTERED, LEE TURNER, ELDON L. BOISSEAU, HAL D. MELTZER, JOHN L. CARMICHAEL, DEBORAH L. CARNEY, CASEY LAW, CYNTHIA G. BARRETT, INTERSTATE NATIONAL INSURANCE, MAGINNIS AND ASSOCIATES, ROBERT T. STEPHAN, HAROLD S. YOUNGENTOB, H. PHILLIP ELWOOD, ARTHUR E. PALMER, EDWIN D. SMITH, AND JUSTICE B. KING,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

(Respondents are not satisfied with the manner in which Petitioner has framed the issues. In accordance with Supreme Court Rule 34.2, Respondents submit the following which they believe to be the only legal issue genuinely presented in this case.)

HAS PETITIONER DEMONSTRATED ANY REASON JUSTIFYING THE ISSUANCE OF A WRIT OF CERTIORARI?

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STATEMENT OF THE CASE

Respondents respectfully submit this brief in opposition to the petition for writ of certiorari filed on behalf of Robert E. Pitts, D.D.S., (hereinafter, "Pitts"). For the reasons offered herein, Respondents contend the requested writ of certiorari is not warranted. Pitts has failed to raise any genuine legal issues worthy of review by this Court; there is no valid reason why the extraordinary remedy of a writ of certiorari should issue in this case. The decision of the United States Court of Appeals for the Tenth Circuit, 850 F.2d 650 (1988), affirming the decision of the United States District Court for the District of Kansas, is a decision supported by the prevailing case law and precedents. That decision should be effectively affirmed by denial of Pitts' petition for writ of certiorari.

A. Nature of the Proceedings Below:

Pitts brought this case in the United States District Court for the District of Kansas, where it was designated Case No. 84-4342. His Complaint/Amended Complaint (filed 10/15/84 and 7/25/86, respectively) alleged violations of the Racketeer Influenced and Corrupt Organizations Act (i.e., RICO), 18 U.S.C. §1961 *et seq.*; civil rights claims pursuant to 42 U.S.C. §§1983 and 1985(2); and pendent common-law claims for fraud, legal malpractice, breach of fiduciary duty, breach of contract, and tortious interference with existing and prospective business advantages.

All the Respondents (defendants in the district court) filed motions to dismiss for failure to state a claim upon which relief can be granted. On August 26, 1986, the

district court dismissed Pitts' Complaint/Amended Complaint. That court ruled that Pitts' RICO and Civil Rights allegations failed to state claims upon which relief could be granted. The district court also held that there was no substantial federal question supporting federal jurisdiction, and therefore dismissed Pitts' pendent claims as well.

Pitts duly perfected an appeal to the United States Court of Appeals for the Tenth Circuit, where the case was docketed as No. 86-2442. Briefs were filed, and on July 5, 1988, the Tenth Circuit affirmed the lower court's dismissal of Pitts' Complaint/Amended Complaint. The decision of the Tenth Circuit is reported at 850 F.2d 650.

Pitts thereafter timely filed his petition for writ of certiorari with this Court, which docketed this case as No. 88-823 on November 17, 1988.

B. Allegations of Pitts Complaint/Amended Complaint

Summarized below are the allegations made by Pitts in his Complaint/Amended Complaint in District Court Case No. 84-4342. While Respondents do not admit those allegations, Respondents recognize that those allegations must be accepted as true by each court which reviews the sufficiency of Pitts' pleadings.

Pitts was a dentist licensed to practice in Kansas. In approximately 1982, he became the subject of an investigation by the Kansas Dental Board. This investigation eventually escalated into a proceeding for revocation of Pitts' dental license. Respondent Turner and Boisseau, Chartered, represented Pitts before the Kansas Dental

Board. Respondents Lee Turner, Eldon L. Boisseau, Hal D. Meltzer, John L. Carmichael, Deborah L. Carney and Casey Law are or were shareholders and/or employees of Turner and Boisseau, Chartered. Respondent Cynthia G. Barrett was a member and Secretary of the Kansas Dental Board, and Respondents Harold S. Youngentob, H. Phillip Elwood and Arthur E. Palmer were employed by the Board as attorneys.

In approximately May, 1984, the Kansas Dental Board issued its order revoking Pitts' license to practice dentistry in Kansas. On June 12, 1984, Pitts filed a civil rights lawsuit in the United States District Court for the District of Kansas, designated Case No. 84-4207. Named as defendants therein were the Kansas Dental Board, all its individual members (including Barrett) and the aforementioned attorneys employed by the Board. That case was eventually dismissed by the District Court, and that dismissal was recently affirmed *per curiam* by the Tenth Circuit, (Case No. 87-2401, October 20, 1988).

Barrett was insured by Respondent Interstate National Insurance, through its agent, Respondent Maginnis and Associates. Pursuant to this contract of insurance, Turner and Boisseau, Chartered, was engaged to represent Barrett in Case No. 84-4207. Respondent Robert T. Stephan also entered his appearance as Attorney General of the State of Kansas representing the Kansas Dental Board and Barrett. Respondents Edwin P. Smith and Justice B. King were retained to defend Youngentob, Elwood and Palmer in Case No. 84-4207.

In this case, Pitts alleges that Turner and Boisseau, Chartered, and its various shareholders and employees,

breached fiduciary duties owed to him, breached their contract with him and committed legal malpractice by appearing adversely to him in Case No. 84-4207. He makes a similar claim against Stephan, based on allegations that Stephan was also one of his attorneys in the proceeding before the Kansas Dental Board. The remaining Respondents are alleged to have tortiously interfered with Pitts existing and prospective business advantages.

In an effort to invoke the jurisdiction of the federal courts, the Complaint/Amended Complaint characterized the alleged conspiracy against Pitts in Case No. 84-4207 as violations of RICO, and of 42 U.S.C. §§1983 and 1985(2). The "predicate acts" underlying Pitts' RICO claim were alleged instances of mail and wire fraud. His civil rights claims were based on allegations that Respondents engaged in state action by virtue of Attorney General Stephan's appearance in Case No. 84-4207 and the general conspiracy among all Respondents, and that Respondents discriminated against him based upon his religious beliefs and practices. The alleged purpose behind this grand conspiracy theory was to thwart Pitts in his attempt to challenge the revocation of his license in Case No. 84-4207. Pitts claims to have been injured in his person and property as a result of this alleged conspiracy.

ARGUMENT

In Respondents' view, the sole issue presented is whether Pitts has demonstrated any reason justifying the issuance of the writ of certiorari he seeks. Respondents

respectfully submit that Pitts has not done so, and that his petition should therefore be denied.

The factors which govern consideration of petitions for writ of certiorari are enumerated in Supreme Court Rule 17.1. Summarized, those reasons include:

1) conflicts in decisions between federal courts of appeal;

2) conflicts between federal decisions and decisions of a state court of last resort;

3) departure from the accepted and usual course of judicial procedure;

4) necessity for settlement by this Court of an important question of federal law.

Rule 17.1 requires that "special and important reasons" exist before this Court will exercise its judicial discretion to review a case on writ of certiorari. *Fay v. Noia*, 372 U.S. 391, 436, 83 S.Ct. 822, 847, 9 L.Ed.2d 837 (1963).

Pitts has not overtly addressed any of the factors enumerated in Supreme Court Rule 17.1. Virtually his entire petition consists of a rambling, repetitious and emotion-filled recitation of his factual allegations. Those allegations were insufficient as a matter of law to support federal jurisdiction, and were incapable of amendment sufficient to state a federal claim.

Generally speaking, a complaint should be dismissed for failure to state a claim upon which relief can be granted only if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. *See Chavez v. City of Santa Fe Housing Authority*, 606 F.2d 282 (10th Cir. 1979). However, this Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 808, 102 S.Ct. 2727, 2733, 73

L.Ed.2d 396 (1982) emphasized its "expectation that insubstantial suits need not proceed to trial. . . . [U]nless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss" (quoting *Butz v. Economou*, 438 U.S. 478, 507-08, 98 S.Ct. 2894, 2911-12, 57 L.Ed.2d 895 (1978)).

As Respondents will demonstrate below, both the District Court and the Court of Appeals correctly followed the overwhelming weight of authority in concluding that Pitts had failed to invoke any federal right of action or to raise a substantial federal question. His Complaint/Amended Complaint was properly dismissed on that basis, and his petition for writ certiorari should similarly be denied.

A. RICO Claims

Subsection (c) of 18 U.S.C. §1964 creates a civil cause of action under the RICO statute. A cause of action under §1964(c) has three basic components: (1) a violation of §1962, (2) an injury to business or property, and (3) a causal link between the violation and the injury.

A "violation of §1962" can and must be broken down into several constituent elements. Generally speaking, §1962 can be violated by any one of the following four types of prohibited activities:

(a) using income derived from a pattern of racketeering activity to acquire an interest in an enterprise;

(b) acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity;

(c) conducting the affairs of an enterprise through a pattern of racketeering activity; and

(d) conspiring to commit any of the above offenses.

Three important concepts are embodied in each of these prohibited activities. The first is an "enterprise", which is defined in §1961(4) as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Depending upon the applicable subsection, the "enterprise" can be the perpetrator, the victim or the prize involved in the prohibited activity. The "enterprise" must engage in or otherwise affect interstate commerce.

The second important concept, "racketeering activity", is defined in §1961(1). Generally speaking "racketeering activity" can be any act included in a veritable laundry list of enumerated criminal offenses, which may be summarized as follows:

(a) a variety of serious criminal offenses chargeable under state law;

(b) numerous acts indictable under a variety of federal criminal statutes, including mail fraud, wire fraud, and obstruction of justice;

(c) certain labor-related federal offenses; and

(d) any offense involving fraud connected with a case under Title II, fraud in the sale of securities, or felonious dealing with dangerous drugs in a manner punishable under federal law.

These offenses are sometimes referred to as the "predicate acts." Even in a civil RICO action the plaintiff must sufficiently allege that the defendant has committed "predicate acts" criminal in nature.

The third important concept is the "pattern." A "pattern" of racketeering activity is defined in §1961(5) as "at least two acts . . . , one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act . . . ."

In summary, a viable RICO claim requires sufficient allegations of each of the following elements:

1) A defendant, who, through the commission of at least two "predicate acts" within the applicable time period,

2) which acts constitute a "pattern";

3) of "racketeering activity",

4) directly or indirectly participates in the conduct of

5) an "enterprise",

6) the activities of which affect interstate commerce,

7) thus injuring plaintiff in his business or property as a result.

See Brannon v. Eisenstein, 804 F.2d 1041 (8th Cir. 1986); *Taylor v. Bear Stearns and Company,* 572 F.Supp. 667, 682 (N.D. Ga. 1983).

Pitts asserted a RICO claim as his first ground for invoking federal jurisdiction. His RICO claim was set forth in conclusory fashion, however, in language which essentially "parrots" the RICO statutes. The District Court dismissed Pitts' RICO claims, and the Tenth Circuit affirmed, on the ground that they were insufficient as a matter of law. Two valid reasons support these decisions.

First, Pitts pled his allegations of fraud (which are at the core of his RICO claim) in a generic fashion. He did not specify the time, the place, the particular representation, who allegedly made the representation or who relied upon it, in his pleading. This inadequacy in the pleading of fraud constituted the first ground upon which the District Court dismissed Pitts' RICO claims.

Rule 9(b) of the Federal Rules of Civil Procedure, 28 U.S.C., requires allegations of fraud to be stated with particularity. This general requirement has been applied many times to cases involving fraud, *Jackson v. Alexander,* 465 F.2d 1389 (10th Cir. 1972); *Duane v. Altenburg,* 297 F.2d 515 (7th Cir. 1962); and to cases involving conspiracy to defraud, *Hayduk v. Lanna,* 775 F.2d 441 (1st Cir. 1985). Several courts have also applied Rule 9 to RICO actions which allege wire and/or mail fraud as the underlying predicate acts. See, e.g., *Schreiber Distributing Co v. Serv-Well Furniture Co., Inc.,* 806 F.2d 1393, 1400-01 (9th Cir. 1986). Pitts' patent failure to plead his allegations of fraud with specificity provided an adequate ground for dismissal of his RICO claims.

A second, even more compelling reason exists in support of the dismissal of Pitts' RICO claims. This reason involves Pitts' allegation of a "pattern" of racketeering activity under RICO. The concept of a "pattern" is the *sine quo non* of a RICO action; it is the engagement in a "pattern" of activity that separates the racketeer from the isolated offender.

In *Sedima, S.P.R.L. v. Imrex Company,* 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1986), this Court drew new attention to the "pattern" requirement under RICO:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in §1961 in that it states that a pattern '*requires* at least two acts of racketeering activity,' §1961(5) (emphasis added) not that it 'means' two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a 'pattern'.

Sedima, 473 U.S. at 496, 105 S.Ct. at 3285, 87 L.Ed.2d at 358-59, fn. 14 (emphasis in original). This Court focused on the legislative history to support this view of the pattern requirement:

> The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: 'The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.' S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that '[t]he term 'pattern' itself requires the showing of a relationship . . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern . . . .' 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See also id. at 35193 (statement of Rep. Poff) (RICO 'not aimed at the isolated offender'). House Hearings at 665. Significantly, in defining 'pattern' in a later provision of the same bill, Congress was more enlightening: 'criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' 18 U.S.C. §3575(e) [18 U.S.C.S.

> §3575(e)]. This language may be useful in interpreting other sections of the Act. *CL Lannelli v. United States*, 420 U.S. 770, 789, 43 L.Ed. 2d 616, 95 S.Ct. 1284 (1975).

Id.

A number of Federal Courts of Appeal have heeded what they deemed to be this Court's call to place new emphasis upon, and to conduct deeper analysis into, the "pattern" requirement. As this Court suggested, both the concept of "relationship" and that of "continuity" (which together form the "pattern") have been scrutinized. By and large, these new decisions have stressed the need for "continuity", that is, the threat of continuing racketeering activity in addition to the "related" racketeering activity which has gone before.

The opinion of the Tenth Circuit in the appeal-at-bar provides a case in point. There, the court quoted from its own earlier decision in *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 927-29 (10th Cir. 1987), discussing the requirements of pleading a RICO violation:

> A violation of section 1962(c) thus 'requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.' *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985). RICO defines racketeering activity as, inter alia, any act that is indictable under 18 U.S.C. §1341 (mail fraud) or 18 U.S.C. §1343 (wire fraud). *See* 18 U.S.C. §1961(1)(B). RICO also states that a ' "pattern of racketeering activity" requires at least two acts of racketeering activity.' 18 U.S.C. §1961(5).
>
> . . . .
>
> . . . [T]o establish a RICO pattern, a plaintiff must also demonstrate continuity, that is, 'the threat of continuing activity.' *Sedima*, 105 S.Ct. at 3285 n. 14.

> This element is derived from RICO's legislative history, which indicates that RICO does not apply to 'sporadic activity' or to the 'isolated offender'. *Id.* 'The continuity requirement has been the source of considerable difficulty. Courts generally agree that to make an adequate showing of continuity under *Sedima*, a plaintiff must demonstrate some facts from which at least a threat of ongoing illegal conduct may be inferred. A scheme to achieve a single discrete objective does not in and of itself create a threat of ongoing activity, even when that goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished.'
>
> 850 F.2d at 652.

See also, *Condict v. Condict*, 815 F.2d 579 (10th Cir. 1987); *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322 (7th Cir. 1986); *Schreiber Distributing Co. v. Serv-Well Furniture Co., supra; Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986); *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986); *Holmberg v. Morrisette*, 800 F.2d 205 (8th Cir. 1986).

The aforementioned cases, and the reasoning they exemplify, represent the dominant trend in the Circuit Court decisions post-*Sedima*. Applying that reasoning to the alleged facts of this case, one finds that Pitts has alleged a single conspirational scheme to injure him. That scheme had a single alleged purpose – to deprive Pitts of any avenue of relief from the order of the Kansas Dental Board revoking his license to practice dentistry – and the alleged scheme would necessarily be at an end when that objective was accomplished. As pointed out by the Tenth Circuit in its opinion below, it is conceptually impossible to construct a "pattern" out of the allegations in this case. On this ground, Pitts' RICO claim was properly dismissed.

B. Civil Rights Claims

Pitts asserted that Respondents had violated 42 U.S.C. §§1983 and 1985(2). The allegations in his Complaint/Amended Complaint were insufficient as a matter of law to state a claim against Respondents under either of those statutes, however.

To establish a claim under 42 U.S.C. §1983, Pitts was required to show, among other things, that Respondents acted "under color of state law." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Pitts conceded in his Brief to the Tenth Circuit that "the [private party] defendants herein are sued in their capacity as wrongful conspirators with state actors." Brief of Appellant at 38. Therefore, the focus of inquiry turns to whether the state actors acted "under color of state law."

In order to sufficiently plead that action was taken "under color of state law", it is not enough to simply allege, as Pitts did, that the actor was an employee of the state. "Acting under color of state law as required by section 1983 is defined as the '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Brown v. Chaffee*, 612 F.2d 497, 501 (10th Cir. 1979) (quoting *Monroe v. Pape*, 365 U.S. 167, 184, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1961)).

Pitts' Complaint/Amended Complaint failed completely to allege how the state actors misused the power of their official positions. Indeed, Pitts did not even specifically plead what action it was which supposedly was

taken "under color of state law". The gist of Pitts' allegations are that Stephan acted as a private attorney for Pitts in his proceeding before the Kansas Dental Board, but then turned against Pitts by representing Barrett and the Kansas Dental Board in Case No. 84-4207. It is well settled that an attorney who defends a personal lawsuit does not act under color of state law even though that attorney has state authority. *Brown v. Chaffee, supra; Phillips v. Fisher,* 445 F.Supp. 552, 554 (D.Kan. 1977); *Goetz v. Windsor Central School District,* 593 F.Supp 526, 528-29 (N.D.N.Y. 1984). Pitts' claim under 42 U.S.C. §1983 failed to include a sufficient allegation of state action by Respondents, and so that claim was properly dismissed by the District Court.

Pitts also alleged in a conclusory fashion that Respondents violated 42 U.S.C. §1985(2). First of all, without even addressing the substantive elements of a §1985(2) claim, Pitts' Complaint/Amended Complaint were subject to dismissal based upon his failure to allege a conspiracy with specificity. See *Phelps v. Washburn University of Topeka,* 632 F.Supp. 455, 461-62 (D.Kan. 1986) (conclusory allegations of a conspiracy without supporting facts are insufficient to state a claim under 42 U.S.C. Section 1985(2)); *See also, Sooner Products Co. v. McBride,* 708 F.2d 510, 512 (10th Cir. 1983); *Clulow v. State of Oklahoma,* 700 F.2d 1291, 1303 (10th Cir. 1983) (conclusory allegations of a conspiracy without supporting facts are insufficient to state a claim under 42 U.S.C. Section 1985(3)).

In addition to his fatally deficient allegations of a conspiracy, Pitts also failed to adequately allege the substantive elements of a §1985(2) claim. The pertinent portion of 42 U.S.C. § 1985(2) provides:

> "If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror . . . "

Pitts' Complaint/Amended Complaint failed to allege that Respondents used "force, intimidation or threat" to deter him from "attending" or "testifying" "in any court of the United States". Nor did the Complaint/Amended Complaint allege that Respondents injured him "in his person or property on account of his having so attended or testified". Nor did the Complaint/Amended Complaint allege that Respondents "influence[d] the verdict, presentment or indictment of any grand or petit jur[y]". In short, Pitts' Complaint/Amended Complaint utterly failed to allege even a single fact which would fall within the ambit of 42 U.S.C. §1985(2). Thus, the dismissal of his purported claim under that statute was correct.

C. Pendent Claims

Generally, whenever there is no basis for federal jurisdiction, common law claims asserted pendently should be dismissed. Indeed, in the absence of an independent basis for federal jurisdiction, pendent claims literally must be dismissed for lack of constitutional power on the part of the federal courts to exercise pendent jurisdiction. As this Court stated in *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966), this power exists when there is a substantial federal claim and when both the state and federal claims "derive from a common nucleus of operative fact", so that plaintiff would "ordinarily be expected to try them all in one judicial proceeding." See also, *Jones v. Intermountain Power Project*, 794 F.2d 546 (10th Cir. 1986). In *Jones*, the Tenth Circuit stated:

> A substantial federal claim is one that has 'substance sufficient to confer subject matter jurisdiction on the court.' The district court lacks subject matter jurisdiction when the federal claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim wholly insubstantial and frivolous.' *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946). As the Ninth Circuit noted:
>
> > *If a federal claim against a party is dismissed before trial, the pendent state law claims should often be dismissed as well. United Mine Workers v. Gibbs*, 383 U.S. 715, 726, [86 S.Ct. 1130, 1138, 16 L.Ed. 2d 218] (1966) . . .
>
> *Traver v. Meshiry*, 627 F.2d 934, 939 (9th Cir. 1980) (emphasis added).

Jones, 794 F.2d at 549.

The motions to dismiss of Respondents which the District Court eventually sustained were filed shortly after Pitts filed his original Complaint. As Pitts has pointed out in his petition to this Court, approximately two years of discovery took place before he filed his Amended Complaint. The District Court's order and judgment of dismissal promptly followed the filing of Pitts' Amended Complaint, and was based on the law briefed by Respondents in their long-pending motions to dismiss. Pitts thus had two years of discovery in which to frame an Amended Complaint which could withstand Respondents' motions to dismiss, but he failed to do so. The First Amended Complaint, filed after two years of discovery, still failed to allege a cognizable federal claim or raise a substantial federal question. The dismissal of Pitts' pendent claims along with his spurious federal claims was mandatory under the law of *United Mine Workers v. Gibbs, supra.*

CONCLUSION

Pitts has presented no conflict between decisions, nor has he demonstrated sufficient departure from accepted judicial procedure to warrant this Court's review of this case on writ of certiorari. The decision of the United States Court of Appeals for the Tenth Circuit, affirming the decision of the United States District Court for the District of Kansas, dismissing Pitts' Complaint/Amended Complaint, was correct and in accordance with the weight of authority and precedence in all respects. Respondents

humbly urge this Court to deny Pitts' petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

Rule 17.1 of the Rules of the Supreme Court of the United States, 28 U.S.C., provides:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's decision, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual court of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

18 U.S.C. § 1964 (c) provides:

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1962 provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning or section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

(footnote omitted).

18 U.S.C. § 1961(1), (4), and (5) provide:

As used in this chapter–

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States

Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

. . . .

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985(2) provides:

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or

threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Rule 9(b) of the Federal Rules of Civil Procedure, 28 U.S.C., provides:

(b) Fraud, Mistake, Condition of the Mind. In all a verments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.